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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ELVIN WORTHEY, JR., Defendant and Appellant.	B214029 (Los Angeles County Super. Ct. No. YA071874)

APPEAL from a judgment of the Superior Court of Los Angeles County. Hector M. Guzman, Judge. Affirmed.

Cynthia L. Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Elvin Worthey, Jr. (appellant), of kidnapping (count 1; Pen. Code, § 207),[1] first degree residential robbery (count 2; § 211), carjacking (count 3; § 215, subd. (a)), assault with a firearm (count 4; § 245, subd. (a)(2)), two counts of possession of a firearm by a felon (counts 5 & 6; § 12021, subd. (a)(1)), possession of ammunition (count 7; § 12316, subd. (b)(1)), first degree burglary with a person present (count 8; § 459), and receiving stolen property (count 9; § 496, subd. (a)). The jury found that appellant personally used a firearm during the commission of counts 1, 2, 3, 4, and 8. (§§ 12022.5, 12022.53, subd. (b).)

In a bifurcated proceeding, the trial court found that appellant had suffered a prior felony conviction that qualified as a "strike" under the Three Strikes Law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and as a "serious felony" under section 667, subdivision (a), and had served three prior prison terms under section 667.5, subdivision (b). The trial court sentenced appellant to 55 years in state prison.

On appeal, appellant contends substantial evidence does not support the convictions for kidnapping and carjacking. Additionally, appellant contends the trial court should have stayed punishment on the kidnapping, assault with a firearm, and burglary counts pursuant to section 654. We affirm.

FACTUAL BACKGROUND

On September 12, 2007, Michael Richardson left his house at about 7:30 a.m. to drop his daughter off at school. At approximately 11:00 a.m., Richardson returned home. He parked his car in the driveway and entered his house through the den.[2] Richardson saw that there was a message on the answering machine. While Richardson was playing the message, appellant came out from the master bedroom, pointed a gun at him, and

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 The den had windows with blinds that were open at the time. With the blinds open, one had a view out into the street. Also, one of the doors in the den opened directly onto the street.

said, "Freeze motherfucker." Appellant approached Richardson, placed the gun to Richardson's forehead and told Richardson that he was going to kill him. Appellant turned Richardson around and placed his gun against the back of Richardson's head. Appellant pushed Richardson from the den toward a spare bedroom in the back of the house, a distance of 71 feet. When appellant and Richardson reached the spare bedroom, Richardson feared that his life was over because the room was secluded.[3]

Once in the spare bedroom, appellant forced Richardson to kneel and instructed Richardson to place his hands behind his head. Appellant then "stuck the gun very strongly" against the back of Richardson's neck and repeated that he was going to kill him. Appellant went on to make the following statements: "I'm going to kill you." "Why do you like to fuck little girls?" "I'm going to kill you, I'm going to pop a cap in your ass." Richardson had no idea what appellant was talking about.

Appellant then instructed Richardson to get underneath the bed. Richardson explained that he could not do so because there were several plastic storage crates already under the bed. Appellant instructed Richardson to remove the crates and Richardson, fearing for his life, complied. Once the crates were out of the way, Richardson struggled to get under the bed, which had a six- to eight-inch clearance from the floor. Appellant picked up the bed and forced Richardson under it. Richardson managed to get most of his body under the bed. Appellant covered the portion of Richardson's body that was not under the bed with the mattress and box spring. Appellant again told Richardson that he would "pop the cap in [his] ass" and kill Richardson. Appellant went to a nearby closet, pulled out some items, and piled them on top of the bed in an apparent attempt to cover or bury Richardson. Appellant left the spare bedroom and walked down the hall and toward the kitchen.

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3 The spare bedroom had a sliding glass door that was covered by a curtain. The glass door led to the backyard, which was separated from the street by a wall. According to Richardson, one could not see the street from inside the spare bedroom.

Richardson began wiggling his body to escape. The items that were piled on top of the bed cascaded down onto the floor and made a noise. Appellant returned, pulled Richardson from under the bed, and forced Richardson to kneel on the ground and place his hands behind his back. Appellant forcibly pushed the gun against the base of Richardson's neck. Appellant demanded Richardson's wallet. Richardson, fearing for his life, took his wallet and car keys out of his pocket and gave them to appellant. Appellant forced Richardson under the bed again and walked out of the room.

Richardson heard some tones that indicated appellant was dialing someone on a telephone. He then heard the following one-sided conversation:

"I'm here. There's somebody in the house. What should I do?

"No, I'm not going to kill him.

"I'm going to kill him. Yes, I'm going to kill him."

Richardson heard appellant's footsteps become lighter and eventually he heard nothing at all. He began extricating himself from under the bed and made a noise, which prompted appellant to return to the spare bedroom. Appellant pulled Richardson from under the bed and again forced him to kneel with his hands behind his head. Appellant then forcefully placed the gun at the base of Richardson's skull. Richardson struggled to stay on his knees because appellant pushed downward with the gun. Appellant warned Richardson that if Richardson moved, appellant would kill him. Appellant left the room and then returned with a chain that he had removed from a cuckoo clock in the living room. Appellant tied Richardson's hands behind his back and instructed him to get under the bed again.

Appellant left the room and soon after, Richardson heard his car alarm activate, deactivate, activate, and deactivate again. Appellant returned to the spare bedroom and asked Richardson how to start his vehicle. Richardson told appellant to use the key and appellant left the room. Richardson then heard the tires of his car squealing up the street. Once Richardson heard no movement in the house, he wriggled out from under the bed, freed one of his hands from the chain, and opened the sliding glass door. He ran into his

backyard and out into the street. Once on the street, Richardson called for help and his neighbor responded.

Officers from the Torrance Police Department (PD) took DNA samples from Richardson's body and dusted his house for fingerprints. After the authorities had departed, Richardson found a battery cover to a cell phone and a black nylon backpack, neither of which belonged to him. Inside the backpack was a large knife with a double-edged blade approximately 12 inches long.

Two days later, Richardson's vehicle was found abandoned in the City of Carson. The vehicle had been ransacked and items were strewn across the seats.

Several months later, authorities apprehended appellant. Inside appellant's residence, they found a loaded handgun, live rounds, an heirloom gold knife, a Swiss Army knife, and a California driver's license that belonged to a person named Maria Hernandez.[4] Richardson identified the heirloom knife and Swiss Army knife as his. Appellant's residence was located less than half a mile from where Richardson's vehicle was found abandoned.

A Torrance PD detective showed Richardson a six-pack photographic display that included appellant's photograph. Richardson did not identify appellant's photograph as the assailant. At trial, however, Richardson unequivocally identified appellant as the assailant. Richardson explained that the photograph of appellant used in the six-pack was not a good representation of appellant.

A senior criminalist with the Los Angeles County Sheriff's Department testified that a DNA swabbing of the interior driver's side door of Richardson's vehicle matched appellant's DNA. The criminalist testified that the probability of a random DNA match was one in 162.4 quintillion.

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4 Maria Hernandez testified that a man approached her from behind, reached into her pocket, took her license, and ran away. She reported the incident to the Torrance PD in June 2008.

Abe Catabay, an identification analyst for the defense, testified that none of the fingerprints lifted from Richardson's home matched appellant's fingerprints.

DISCUSSION

I. Kidnapping

Appellant argues that substantial evidence does not support the kidnapping conviction because there was insufficient evidence of asportation.

In *People v. Whisenhunt* (2008) 44 Cal.4th 174, the California Supreme Court summarized the well-established standard of review. "'In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]' [Citation.]" (*Whisenhunt*, at p. 200.)

"Generally, to prove the crime of kidnapping, the prosecution must prove three elements: (1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance. (§ 207, subd. (a).)" (*People v. Jones* (2003) 108 Cal.App.4th 455, 462, fn. omitted.) In determining whether the prosecution has met its burden of showing substantial movement in order to satisfy the asportation element of simple kidnapping, the trier of fact may consider more than the actual distance moved. (*People v. Martinez* (1999) 20 Cal.4th 225, 235 (*Martinez*).) The kidnapping statute does not speak of movement over any specified distance, and limiting a jury's consideration to a particular

distance is "rigid and arbitrary, and ultimately unworkable." (*Id*. at p. 236.) The required distance cannot be specified in a fixed number of feet or inches. (See *People v. Rayford* (1994) 9 Cal.4th 1, 17.) The jury may consider the "totality of the circumstances" (*Martinez, supra,* at p. 237) and the scope and nature of the movement, including the increased risk of harm to the victim, the decreased likelihood of detection, the increased danger in the victim's foreseeable attempts to escape, and the perpetrator's opportunity to commit additional crimes. (*Rayford, supra,* 9 Cal.4th at p. 17.)

Movement over short distances is sufficient to satisfy the asportation element of kidnapping when the movement substantially alters the "'context of the environment.'" (*People v. Diaz* (2000) 78 Cal.App.4th 243, 247 (*Diaz*).) In *Diaz*, the defendant forcibly moved the victim 150 feet from a lighted intersection to a nearby park that was dark. (*Id*. at p. 248.) The Court of Appeal held that there was sufficient evidence of asportation because the movement placed the victim out of the public's view and increased the likelihood that the perpetrator would not be detected. (*Id*. at pp. 248-249; see also *People v. Dominguez* (2006) 39 Cal.4th 1141, 1151-1153 [defendant forcibly moved victim from shoulder lane to embankment 25 feet away; sufficient evidence of asportation because the movement "changed the victim's environment from a relatively open area alongside the road to a place significantly more secluded, substantially decreasing the possibility of detection, escape or rescue"]; *People v. Shadden* (2001) 93 Cal.App.4th 164, 169-170 [defendant moved victim nine feet from the front counter of a video store to a back room; sufficient evidence of asportation because the movement increased the risk of harm to victim by decreasing the likelihood of detection].)

Here, it was up to the jury to decide under the totality of circumstances whether Richardson's forced movement of 71 feet from the den to the spare bedroom was substantial. The jury decided it was substantial, and we find that decision to be supported by substantial evidence. The den in which appellant first accosted Richardson had windows that provided a view to the public street. The blinds were open and anyone passing by could have seen what was taking place in that room. Moreover, the den had a

door that led to the public street, which provided a possible route of escape for Richardson.

The spare bedroom where appellant forcibly moved Richardson, on the other hand, was far more secluded. The room did not have a view onto the public street. Moreover, the sliding glass door in that room was covered with a curtain, and once the door was opened, it led only to the backyard. Given these conditions, the movement of Richardson from the den to the spare bedroom substantially altered the context of the environment by increasing the risk of harm to Richardson and decreasing the likelihood that someone would detect appellant's actions from the street. (*People v. Shadden*, *supra*, 93 Cal.App.4th at p. 169 ["But where a defendant moves a victim from a public area to a place out of public view, the risk of harm is increased even if the distance is short"].) Richardson was keenly aware of this fact when he testified that he felt his life was over because the spare bedroom was so secluded.

II. Carjacking

Appellant argues that substantial evidence does not support the carjacking conviction because there was insufficient evidence that appellant took Richardson's car from his immediate presence by means of force or fear.

"'Carjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215, subd. (a).)

We turn first to appellant's claim that he did not take Richardson's car keys by force or fear. According to appellant, the car keys simply "fell out of [Richardson's] pocket when he removed his wallet." We disagree with appellant's reading of the record. The relevant portion of Richardson's testimony is as follows:

"Q: When the defendant came back in that second time, what happens?

"A: I was pulled out from underneath, again told of the—back at execution style, kneeled down, hands behind my head. The gun is again very forcibly in the back of my head at the base of my neck.

"Q: Okay.

"A: I'm struggling, really, to keep upright. At this point, I'm asked for my wallet. And I toss my wallet out of my pocket to my left. And at the same time, the keys from my car went with it as well.

"Q: Okay. How did you get out from underneath the bed?

"A: I was at—he lifted the bed and asked me to get out.

"Q: When you took your wallet and keys out of your pocket, did you want to do that?

"A: Absolutely not.

"Q: Why did you do that?

"A: Because, again, I was threatened by my life with a gun, and I'm doing what's told.

"Q: After you took out the wallet and the keys from your pocket, what happens next?

"A: After I took out the wallet and the keys out of my pocket and tossed them, I'm asked to get back underneath the bed."

Thus, contrary to appellant's claim, Richardson's keys did not simply fall out of his pocket. Rather, Richardson, who had a gun jammed against the base of his skull, took the keys, along with his wallet, out of his pocket and gave them to appellant out of fear for his life. Even though appellant did not ask for the car keys specifically, that certainly does not mean that he did not take the car keys from Richardson by means of force or fear.

We turn next to appellant's claim that he did not take Richardson's vehicle from Richardson's immediate presence.

The element of "immediate presence" does not require that the owner of a vehicle be physically present or even physically proximate when the taking of his vehicle occurs.

(*People v. Medina* (1995) 39 Cal.App.4th 643, 650-651 (*Medina*).) Rather, the element of "immediate presence" merely requires that the "property (vehicle) be within one's reach or control such that possession could be retained if the victim was not overcome by fear." (*Id*. at p. 650.) For instance, in *Medina*, the defendants took the victim's car keys, tied him up in a motel room, and took his car, which was parked outside the motel room approximately 20 feet away. The Court of Appeal held that these facts were sufficient to satisfy the "immediate presence" requirement. (*Id*. at pp. 651-652.) Likewise, in *People v. Hoard* (2002) 103 Cal.App.4th 599 (*Hoard*), the defendant took the victim's car keys, tied her up in the jewelry store at which she worked, and took her car, which was parked in the store's parking lot. As in *Medina*, the Court of Appeal held in *Hoard* these facts were sufficient to establish the crime of carjacking. (*Hoard*, *supra*, at p. 609.) It reasoned: "Although [the victim] was not physically present in the parking lot when he drove the car away, she had been forced to relinquish her car keys. Otherwise, she could have kept possession and control of the keys and her car. Although not the 'classic' carjacking scenario, it was a carjacking all the same." (*Ibid*.)

Here, Richardson's car was parked in his driveway and clearly within his reach and control at the time the incident took place. As in *Medina* and *Hoard*, Richardson would have kept possession and control of his car had he not relinquished his car keys out of fear for his life.

People v. Coleman (2007) 146 Cal.App.4th 1363 (*Coleman*), cited by appellant, is inapposite. In that case, an owner had parked his truck (a Silverado) in front of his shop and placed the keys in the back work area. (*Id*. at. p. 1366.) The shop owner left and there was one employee working in the shop when the defendant approached her. The defendant demanded the keys to the truck at gunpoint and the employee gave them to him. On appeal, the defendant argued that there was insufficient evidence to support the "immediate presence" element of his carjacking conviction. The Court of Appeal "acknowledge[d] that a carjacking may occur where neither the possessor nor the passenger is inside or adjacent to the vehicle," but held that a carjacking had not occurred under these particular facts because "[the employee] was not within any physical

proximity to the Silverado, the keys she relinquished were not her own, and there was no evidence that she had ever been or would be a driver of or passenger in the Silverado." (*Id*. at p. 1373.)

Here, unlike in *Coleman*, Richardson owned the vehicle in question and had driven it just minutes before appellant had accosted him. And, unlike in *Coleman*, Richardson had parked the vehicle in his own driveway and not a public street. In short, neither appellant's arguments nor the *Coleman* decision persuades us to reverse the carjacking conviction.

III. Section 654

Appellant argues that the trial court should have stayed punishment on the kidnapping, burglary, and assault counts pursuant to section 654 because they were all incident to the carjacking.

In relevant part, section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

"'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) "[M]ultiple crimes are not one transaction where the defendant had a chance to reflect between offenses and each offense created a new risk of harm." (*People v. Felix* (2001) 92 Cal.App.4th 905, 915.) "'It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] . . . [I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.]' [Citation.]" (*People v. Hicks* (1993) 6 Cal.4th 784, 789.)

A defendant's intent and objective are questions of fact for the trial court. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) Consistent with that, case law establishes that "'there must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he was sentenced. [Citation.]' [Citation.]" (*Coleman*, at p. 162.) Our task is to review factual determinations under the substantial evidence test. (*Kennedy/Jenks Consultants, Inc. v. Superior Court* (2000) 80 Cal.App.4th 948, 959.)

Here, the trial court ruled that the acts of carjacking, kidnapping, assault, and burglary were "divisible, with multiple objectives and intents." Substantial evidence supports that ruling. Appellant's objective behind the carjacking was clearly to take Richardson's vehicle. Appellant's objective behind the burglary was to take personal property from Richardson's home, including an heirloom gold knife. The objectives behind these theft-related offenses were certainly distinct from the objective behind the assault count. The record shows that appellant forced Richardson on multiple occasions to kneel and place his hands behind his back. In that extremely vulnerable and frightening position, appellant shoved a gun to the base of Richardson's skull, repeatedly threatened his life, and accused him of pedophilia. We agree with the trial court that appellant's objective in committing the assault was to "humiliate and terrorize" Richardson, and not simply to take his property or vehicle. Finally, the objectives behind the theft-related offenses and assault were distinct from the objective behind the kidnapping. Appellant certainly could have committed the carjacking, burglary, and assault without forcibly moving Richardson to the spare bedroom. Instead, appellant elected to forcibly move Richardson to a location that increased the risk of harm to Richardson and decreased the likelihood of detection. The kidnapping was not incidental to any of those offenses and was a separate act of violence altogether.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

ASHMANN-GERST